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THE SUSPENSION OF HABEAS CORPUS DURING THE WAR OF THE REBELLION.

THERE are several writs of *habeas corpus* known among lawyers, and they are used for various purposes. But when people speak of the writ of *habeas corpus* without more, they mean the great writ *ad subjiciendum*, the bulwark of liberty, the great writ of liberty, as it is called. It is the writ which is applied for when a man is supposed to be unjustly held in custody, and when it is issued and served, the person holding the prisoner must bring him before the judge and show cause for the detention. If the detention cannot be justified the prisoner will be discharged. The object of *habeas corpus* is to inquire into the legality of imprisonment, whether it is by competent authority and for a sufficient reason; and according to the evidence given at the hearing, the prisoner is either discharged, bailed, tried, or remanded to custody.

From a political point of view, the great value of *habeas corpus* is that it protects citizens from a dangerous tendency which is generally found in those who exercise the powers of government. These rulers of men often want to rid themselves quickly of their personal enemies or of those whom they choose to consider the enemies of their country, and one of the easiest methods is to arrest on any sort of charge or suspicion, and keep the victim in confinement simply by not allowing him to be brought to trial. And it has often been said, —and the Bastille and the Tower of London will warrant the assertion, —that the power secretly to hurry a man to jail, where his sufferings will be unknown or soon forgotten, is more dangerous to freedom than all the other engines of tyranny. On the other hand, it is generally admitted that when a government is attacked by a rebellion it is impossible for it to protect itself from conspirators and assassins if every one of them has to be taken before a court of law and proved guilty

beyond a reasonable doubt. In such a crisis some arbitrary power must be given. The sovereign, whether king, president, or legislature, must be allowed to arrest on suspicion, without giving reasons; and in doing this, to preserve the balance between the liberty of the citizen and the safety of the government is one of the great problems of political science.

Whether it is the President or Congress that has power under the constitution to suspend the privilege of the writ of *habeas corpus* was a burning question during the civil war. When Lincoln became President in the spring of 1861 he found the Southern states in rebellion against the general government, and to subdue them and bring them back into the Union he conceived to be the duty of his office. Against the enemy in the rebellious states he employed the army and the navy, and against those individuals who in the North gave aid and comfort to the enemy and plotted to betray the government he employed the power of arrest and imprisonment. Like many others who have been placed in a similar predicament he found that the procedure of the courts was insufficient. There were men in Baltimore, Philadelphia and New York, in the cities of the West, in the departments at Washington, and in the White House itself who were ready and eager to hand over the government's property and strongholds to the rebels, and had laid their plans with that intent. Their schemes must be forestalled, their conspiracy killed before it blossomed. But none of them could be convicted by a court of law until they had committed an overt act. If arrested on mere suspicion they would be promptly discharged by a *habeas corpus*. The remedy for this state of affairs is to get rid of the troublesome writ; and this Lincoln proceeded to do. He began to arrest, without any warrant from a magistrate and usually by a military officer, those whom he suspected of treasonable designs, and he instructed the officers who had the prisoners in charge to disregard any writ of *habeas corpus* that was issued to them and to say that he had suspended it.¹ The case of John Merryman, one

¹ It was on the 27th of April, 1861, that Lincoln addressed to General Scott his first suspending order:

of these prisoners, was the first to come up for judicial interpretation. Merryman lived near Baltimore, and appears to have been suspected of being captain of a secession troop, of having assisted in destroying railroads and bridges for the purpose of preventing troops from reaching Washington, and of obstructing the United States mail.¹ By order of General Keim of Pennsylvania he was arrested at night in his own house, and taken to Fort McHenry at that time in command of General George Cadwallader. Taney, who was then Chief Justice of the United States, granted a *habeas corpus*, but Cadwallader refused to obey it, saying that the privilege had been suspended by the President. On the return of the writ, the Chief Justice filed an opinion denying that the President had any power to suspend *habeas corpus* and affirming that such power rested with Congress alone. Lincoln continued to arrest and imprison without any regard to this opinion, and indeed was advised by his Attorney-General that he was not bound to notice it.

Thus far Lincoln had suspended the writ merely by orders to his officers to disregard it. On the 24th of September, 1862, he made use of more formal proceedings and suspended it by proclamation. On March 3, 1863, an act of Congress was passed giving the President discretionary power to suspend the writ during the continuance of the rebellion.² The writ of

"You are engaged in suppressing an insurrection against the laws of the United States. If at any point on or in the vicinity of any military line which is now or which shall be used between the City of Philadelphia and the City of Washington, you find resistance which renders it necessary to suspend the writ of *habeas corpus* for the public safety, you personally or through the officer in command, at the point at which resistance occurs, are authorized to suspend the writ.

ABRAHAM LINCOLN.

By the President,

WM. H. SEWARD, *Secretary of State*."

Similar orders were afterwards issued for other places.

¹ Merryman was soon discharged. For an account of the charges against him I am indebted to one of his counsel, Mr. George M. Gill of the Baltimore Bar.

² 12 U. S. Statutes at Large, 755. By the second section of this act the Secretary of State and the Secretary of War were required to furnish the Federal judges with lists of the prisoners, their residences, places of confinement, and places where their offences were committed. When a grand jury of any of the courts having jurisdic-

habeas corpus was therefore not suspended by Congress until the rebellion was half over. In other words, Lincoln suspended it for two years of his own accord and without authority from any one; for two years he made arrests without warrants and held men in prison as long as he pleased. The first arrests were caused by the attempts of the Baltimoreans to prevent Northern troops from reaching Washington, and by the fear that Maryland would secede. The Mayor and the police commissioners of Baltimore, many members of the Maryland legislature, newspaper editors, and other persons of distinction and influence were given lodgings inside of Fort McHenry and Fort Warren. Afterwards, executive arrests were made all over the country, especially in the West. An order, issued August 8, 1862, authorized marshals and chiefs of police to arrest any one who discouraged volunteer enlistments, gave aid or comfort to the enemy or indulged in any other disloyal practice. Discouraging enlistments and disloyal practices were offences unknown to the law; and the phrase disloyal practice was large enough to include anything.

There are few things in American history more worthy of discussion than the power exercised by Lincoln in those two years. It was absolute and arbitrary and, if unauthorized, its exercise was a tremendous violation of the constitution. Whether it was justifiable and necessary is another matter. If it was unconstitutional and yet necessary in order to save the Union, it shows that the constitution is defective in not allowing the government the proper means of protecting itself. That Lincoln used this power with discretion and forbearance there is no doubt. He was the most humane man that ever wielded such authority. He had no taste for tyranny, and he knew the temper of the American people. But, nevertheless, injustice was sometimes done. His subordinates had not always their master's nature; they sometimes indulged their malice; they sometimes arrested without excuse, and were

tion of any of the prisoners had terminated its session, those who stood unindicted were to be brought before the judge to be discharged if they would take the oath of allegiance.

sometimes brutally severe in the arrest. Such things are perhaps inevitable when a great rebellion is to be subdued ; but we must regret that they happened in America.

The constitution contains one short paragraph about *habeas corpus* and not a word more : —

The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

This passage occurs in the first article which is devoted to the legislative power ; and up to the time of the rebellion it was the general opinion that Congress alone had the right to suspend. When Lincoln and his Attorney-General claimed the power for the President, nearly everybody was surprised and many were shocked. They had supposed that the question was a settled one. When Aaron Burr and his conspiracy became so formidable as to suggest the suspension of *habeas corpus*, Jefferson, who was then President, submitted the whole matter to Congress, claiming no right for himself, and in the discussion which followed no one suggested that the President might exercise the power. When the state conventions were adopting the constitution the *habeas corpus* clause was never mentioned without it being taken for granted that Congress alone could suspend, and some thought that the debates of the convention which framed the constitution showed that such was also the opinion of the fathers of the republic. More conclusive than all, was the position of the clause itself. It occurs in the article devoted to the legislature and contains no words giving power to the executive, while the article devoted to the executive, where mention of the power would naturally be made if it belonged to the President, is entirely silent on the subject. The constitution uses the word suspend. No law can be suspended except by the legislature. The writ of *habeas corpus* is a law ; for it is created by act of Congress, and therefore Congress alone can suspend it. In England, Parliament, and not the Crown, suspends the writ, and the makers of our constitution would naturally have followed the English custom,

or having it before their eyes would certainly not have made the American President more powerful over civil liberty than the English King. Moreover, authority had spoken. Story in his Commentaries¹ gives the power to Congress, and Chief Justice Marshall in deciding Bollman's case² incidentally expressed himself as of the same opinion.

A few months after the publication of Taney's opinion in Merryman's case a remarkable pamphlet appeared. It was by Horace Binney, for many years the leader of the Philadelphia Bar, and at that time retired from practice and in his eighty-second year. Before Binney's pamphlet appeared Lincoln's action had of course been discussed in the newspapers. Of those who supported the President, some maintained that as commander-in-chief of the army and navy he had the implied right to suspend *habeas corpus*; others held that in a rebellion he could declare martial law, which, as it destroyed all civil authority, would easily dispose of the writ. Binney took an entirely new view of the subject. He believed that the President could of his own motion suspend the writ; but he refused to regard such suspension either as the lawful exercise of the military power of the commander-in-chief or as an incident of martial law. He did what no one else had attempted. He took the plain words of the constitution and deduced from them an intention to confer the power of suspension on the President.

The constitution, he said, provides that in cases of rebellion or invasion, when the public safety requires it, the privilege of the writ of *habeas corpus* may be suspended. That is to say, the people of the United States have declared that this great privilege may under certain conditions be denied or deferred, for a season. The constitution authorizes this to be done, but does not expressly authorize any department to do it. The

¹ Sect. 1342.

² *Ex parte Bollman*, 4 Cranch, 75, 95, 101. Bollman was arrested for participating in Burr's conspiracy.

Besides Story and Marshall there are some minor authorities to the same effect. Hurd, *Habeas Corpus*, 133, 134; *Johnston vs. Duncan*, 1 Martin (La.), 157; 2 Tucker's *Blackstone*, 134, note; Sheppard, *Constitutional Text Book*, 143.

department to which the duty falls must be discovered by the delineation and attributes of the departments as laid down in the general scheme of the constitution. All the conditions of the exercise of the suspending power, described in the *habeas corpus* clause, are of executive cognizance, namely, rebellion or invasion, and the requirement of the public safety. The direction of a war, whether of rebellion or invasion, is necessarily with the executive. The suspension of *habeas corpus* is an instrument for repelling invasion or rebellion, and so its use must lie with the President.

It is true, he went on, that in England Parliament alone may suspend. But this English analogy is misleading. The American and English constitutions are very different. By the English constitution, Parliament, being omnipotent, may suspend the privilege of *habeas corpus* at any time, even in time of profound peace, and has in our own day suspended it during labor riots. The American constitution confines the suspension to rebellion or invasion. The unlimited power of suspension allowed in England would undoubtedly be dangerous in the hands of one man, but not so the qualified power of our constitution. Again, it must be observed that in England the privilege of *habeas corpus* is given, without qualification or exception, by an act of Parliament, and nothing but a subsequent act of Parliament can suspend or abridge it. But in America a single clause of the constitution recognizes the privilege and at the same time allows its suspension on certain occasions. The suspending clause in the American constitution stands in place of both the enabling and the suspending act of the English Parliament. In other words, America has a written constitution which cannot be changed by Congress, and England has an unwritten constitution which can be changed at the pleasure of Parliament. If there were in England some law higher than Parliament which said that *habeas corpus* could be suspended only in rebellion or invasion, and it could be shown that under this law it was the practice for Parliament alone to declare the fact of rebellion or invasion and the fact of public danger, then

there might be an analogy. But comparing the two constitutions, as they actually exist, there is none. Our *habeas corpus* clause is entirely un-English because it restrains the legislative power as well as all other power, and it is thoroughly American because it is conservative of personal freedom and also of the public safety in the day of danger.

There is still another particular in which we must guard against analogy. The motive of the English people in putting the *habeas corpus* power entirely within the control of Parliament was their jealousy of the Crown. Before the time of Charles II., the King had often atrociously abused the power of arrest and acted in utter disregard of the privilege of *habeas corpus*. It was the dread of such behavior of their monarchs, who at that time still retained a great deal of their arbitrary power, which aroused the English people to pass the great *habeas corpus* act. But the framers of our constitution had no such fears of the President. The powers of his office had been substantially settled before the *habeas corpus* clause was proposed, and there was nothing in those powers to excite alarm. They had given him no power which he could abuse or enlarge except with more danger to himself than to the country. Elected for only four years, unable to veto a law if two-thirds of each house are opposed to him, unable to make a treaty unless two-thirds of the Senate concur, or to appoint a minister, consul, judge, or any officer but inferior ones without the advice and consent of the Senate, commander of the army and navy but unable to arm a soldier or build a ship unless Congress consent, commander of the militia but only when Congress has called them into service, unable to adjourn Congress except when they disagree as to the time of adjournment, and impeachable for any misconduct in office:—such is the array of our President's powers, and distinguished foreigners¹ have remarked that he is probably the feeblest executive ever known in a civilized community.

The history of the clause in the convention that framed the

¹ De Tocqueville and Bulwer Lytton.

constitution shows strongly the intention of that body. Shortly after the convention met, Pinckney of South Carolina presented what he called "A plan of a Federal Constitution." The sixth article, which was concerned with the legislature, contained the following sentence :

The legislature of the United States shall pass no law on the subject of religion, nor touching or abridging the liberty of the press ; nor shall the privilege of the writ of *habeas corpus* ever be suspended except in case of rebellion or invasion.

Habeas corpus was not mentioned again until three months afterwards, and about three weeks before the final adjournment of the convention. Pinckney was again its guardian and moved, not the adoption of his plan, but a number of propositions to be referred to the committee of detail. He gave the *habeas corpus* proposition the following form :

The privileges and benefits of the writ of *habeas corpus* shall be enjoyed in this government in the most expeditious and ample manner ; and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding — months.

Evidently, Pinckney intended the legislature to suspend. But it is important to observe that in his first motion he confined suspension to rebellion or invasion, and in his second to the most urgent and pressing occasions, and for a limited time. That is to say, in his second motion he left suspension to the discretion of the legislature provided that the suspension did not last longer than a certain number of months. If this last proposition had been adopted, our constitutional provision for *habeas corpus* might have been somewhat like England's ; and of course, if such indefinite power to suspend was given, it was right to place it in the hands of Congress, and not in the hands of the executive. The meagre account which Madison has given of the convention's debates furnishes little or nothing more to guide us, until we find that a few days afterwards Gouverneur Morris disposed of the whole question. He moved that :

The privilege of the writ of *habeas corpus* shall not be suspended, unless where (when) in cases of rebellion or invasion the public safety may require it.

With the substitution of the word when for where, which was probably done by the committee on style, this is the clause as it now stands in the constitution. The convention rejected Pinckney's English view. They limited suspension to conditions which were of executive cognizance, and therefore the reference to Congress became unnecessary, and was abandoned. All reference to the legislature is left out, and as moved by Morris and adopted by the convention this clause was not part of the legislative article, but an amendment to the fourth section of the eleventh article, which treats of the judiciary. Subsequently the committee on style and arrangement placed it in its present position. The duty of that committee was not to change the meaning of any phrase; they were confined strictly to such work as their name implies. By placing the provision in the judiciary article, the mover and the convention may have intended to admonish the judges of a restraint upon their power over the writ. But however that may be, certain it is, that they must have intended to expressly negative Pinckney's idea of a suspending power in Congress.

The committee on style probably placed the clause in the ninth section of the first article because that section is restrictive throughout. Most of the paragraphs restrain Congress, but one of them restrains the executive department, and another restrains all persons who hold an office of trust or profit under the United States. Position in the ninth section is therefore of no avail to give authority to Congress. Nor can position in the first article be used for such a purpose. The first article is not confined to Congress. The tenth section of it contains prohibitions on the states, and the seventh section gives the President the power of veto. In like manner, the judiciary article is not confined to its title, but gives Congress the power to declare the punishment for treason. Several of the powers of Congress are also enumerated in the fourth article. The argument from position proves nothing. The power given by

the suspending clause is left to the department which by the general theory of the constitution has charge of the public safety in times of rebellion or invasion.

If instead of using the word privilege, the clause had spoken of the writ of *habeas corpus* or of a *habeas corpus* act, there might be ground for arguing that a writ or an act being created by legislative power may be suspended only by the same. But the privilege being spoken of, — the privilege of being bailed, tried or discharged, — an arrest and detention, which is exclusively an executive function, is enough to suspend the privilege, and no legislative act is necessary. The clause does not give power to authorize suspension, it gives power actually to suspend. The clause itself contains all the authority. If it had given some department the right to authorize suspension, the authorization might be a legislative act, but the right actually to suspend is executive. No legislative body can suspend the privilege by an act on the person to be affected, and they never attempt it. Parliament never actually suspends *habeas corpus*. They authorize the crown or ministry to do it as the occasion arises. That is all that Congress could do, namely, give effect to the action of the President or some one else, and that the constitution does already.¹

Binney attempted to show, that no authority to any department could be inferred from English analogy, or from the position or wording of the clause, and that suspending the privilege was naturally an executive act. Whether it is an executive act under the constitution depends somewhat on the question, which department has the duty of ascertaining the conditions of rebellion or invasion and the requirement of public safety. Binney argued that it was clearly the executive. It is his duty faithfully to execute the laws and to protect the constitution.² He is commander-in-chief of the

¹ The *Habeas Corpus* act of Congress, passed March 3, 1863, supports this reasoning. The first section provides that "during the present rebellion the President of the United States, whenever in his judgment the public safety may require it, is authorized to suspend the writ of *habeas corpus*," etc.

Congress does not attempt to suspend but authorizes the President to do so.

² Const. Art. 2, sec. 3, "He shall take care that the laws be faithfully executed."

army, navy and militia, and if the laws or the constitution are menaced by an invasion or rebellion, it surely belongs to him to decide the fact, to measure the danger and what the public safety requires. If it is his duty to execute the laws and defend the constitution he must have the right to determine when the facts exist which bring his duty into operation. The suspension of *habeas corpus* is most effective when used quickly in the beginning of an outbreak or conspiracy. Congress can never use it quickly and is often not in session.

This was Binney's argument in support of Lincoln. Such a powerful handling of the subject could not be disregarded. Answers and criticisms came from all sides. He seemed, as he himself said, to have flushed and put upon the wing a whole covey of reviewers.¹ Some of them were anonymous, and some had difficulty in finding a printer, for in those days the expression of an opinion, even in the North, would sometimes result in social ostracism, and there was also an apprehension that perhaps the mob might take part in constitutional discussions.

The foundation of Binney's argument was that the *habeas corpus* clause, even if expressed in the form of a restriction, implied a grant. It restricted suspension to certain conditions, and at the same time granted power to some department to suspend when those conditions were fulfilled.² This was also the underlying principle of Chief Justice Taney's opinion,

Const. Art. 2, sec. 1, "Before he enter on the execution of his office, he shall take the following oath or affirmation: — 'I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.'"

¹ I have been able to find about forty pamphlets written during the war on the *habeas corpus* question. Besides these there are newspaper and magazine articles and the speeches in the Congressional debates. The pamphlets can be seen in the Philadelphia libraries, in the Public Library of Providence, and in the Boston libraries. The library of Cornell University has also a good collection. There are, doubtless, other collections, private and public, which have not come to my knowledge.

² He said the clause was elliptical. When the ellipsis was supplied it would read thus: The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it; and then it may be suspended.

although he differed from Binney in regard to the department to which the grant was given. Most of the pamphleteers who answered Binney attacked him at this point. They took the ground that if there had been no *habeas corpus* clause Congress would have had the unlimited right to suspend, and therefore there was no need of reading a grant into the clause, which, as its words implied, was a restriction and nothing more. If it can be shown that the clause is a restriction without a grant, it is at once fatal to Binney's whole chain of reasoning. For if the power to suspend could exist without the clause it would be an unlimited power, and no one would think of arguing that the convention would have given it to the President. In fact, one of Binney's own arguments was that if the power was unlimited it would be dangerous to give it to the President, and that the clause gave it to him because its use was strictly limited to the conditions of rebellion and invasion. If the constitution without the clause gives an unlimited power to some department to suspend, and the clause is simply a restriction on that power, the department intended to wield the power and to be subject to the restriction can be none other than Congress.

One of the reviewers, Judge Nicholas of Kentucky, put the question thus:¹ Suppose, said he, the constitution had no *habeas corpus* clause and was entirely silent about the writ and its suspension, where then would be the power to suspend? It would be of course with Congress. Congress would have untrammelled discretion over the writ and could suspend it or repeal it out of existence. It was this full power, this full discretion, which the convention intended to restrain, and accordingly they made the *habeas corpus* clause restrictive. It does not grant power to suspend, for Congress had that already; but it says that the privilege shall not be suspended except in certain cases. The words of the clause are entirely restrictive and contain no implication of a grant. They presume the existence of something which they restrain. Moreover, as was pointed out by Randolph in the Virginia convention, Congress was

¹ *Habeas Corpus. The Law of War and Confiscation.* By S. S. Nicholas, Louisville, 1862.

specifically given the right to suspend *habeas corpus*, when it was given the right to regulate the courts, out of which the writ issues. The *habeas corpus* clause is an exception to this power.

Binney wrote another pamphlet in reply to this reasoning. He showed what is very evident, namely, that to suppose the constitution silent and infer from that the right of Congress to suspend was mere assertion and a begging of the question. More than that, it was contrary to the most fundamental principle of constitutional law. No powers can be assumed for any part of the government. Nothing is so well settled as the doctrine that Congress has only the powers which are expressly given by the constitution and such other instrumental and incidental powers as are necessary to carry the expressed powers into effect. Ours is a government of enumerated and limited powers, and the powers not mentioned in the constitution are reserved to the states or to the people. It is monstrous to assert that a power exists simply because the constitution says nothing about it. By that reasoning Congress would be omnipotent. It is equally useless to contend that the *habeas corpus* clause is a restriction on the power of Congress to regulate the courts. Congress has no such power. It is true that it can regulate the appellate jurisdiction of the Supreme Court, and decide on the number of inferior courts, but that is all. The constitution says :

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

And again :

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, *etc., etc.*

The constitution has therefore vested the judicial power in certain courts. Congress has a discretion as to the number and order of the inferior courts, but it has no discretion whatever as to vesting or not vesting the whole judicial power in courts of some description. The language of the constitution is manda-

tory. It does not say the judicial power may be vested, but it says it "shall be vested." Congress could not lawfully refuse to create courts of some sort; it could not lawfully refuse to create the means for the exercise of that power which the constitution says shall exist. To suppose that the obligation is not binding, but might at pleasure be declined, is to suppose that under the sanction of the constitution Congress may defeat the constitution. The constitution creates the judicial power, and declares to what questions it shall extend. Congress creates only the instruments which are to use that power; and when thus created the whole judicial power attaches to them, and cannot be diminished or changed by Congress.¹ By the constitution the judicial power extends to questions of personal liberty, and its exercise in that respect cannot be interfered with by Congress.

Congress, having the right to establish the tribunals, must give to them such an organization as will enable them to exercise completely the judicial power created by the constitution. A tribunal is not constituted unless it is endued with the active powers necessary to the exercise of its jurisdiction. The mere erecting of a court by name and the vesting of jurisdiction in it would amount to nothing. It must have the practical powers of bringing parties before it, enforcing its decrees, and issuing writs. It is idle to argue that the withholding or suspending of the writ of *habeas corpus* is an appropriate means of constituting a judicial tribunal. It is a caricature of argument to say, that Congress must create a court in which the whole judicial power is to vest, and at the same time may withhold from that court any of the instruments necessary to the practical exercise of judicial power. Accordingly, the act² which established our courts says, that they "shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and

¹ This reasoning is supported by the decision in *Martin vs. Hunter*, 1 Wheaton, 304. See also Story, Constitution (3d ed.), sec. 1590.

² Sept. 24, 1789.

usages of law." Courts cannot exist without writs, and Congress has given such as were necessary. Can it be contended that they could now cripple the courts by taking away the writ of *habeas corpus*? If they could take away *habeas corpus* they could take away all the other writs, which would in effect be a failure to constitute the tribunals.¹

Even supposing that Congress had the arbitrary power of withholding or repealing the writ, that would not be the same thing as suspending the privilege of it. If the courts were denied the power to issue the writ, that would simply be a denial to the prisoner of his specific remedy, but the principle, the right, the privilege, whereof the constitution speaks, would still remain. The constitution says, the privilege shall not be suspended except in rebellion or invasion. It speaks only of the privilege, and says nothing of the remedy. Congress might tamper with the remedy indefinitely, and yet be far outside the language and meaning of the *habeas corpus* clause. The fact that Congress gives the courts a *habeas corpus* writ has nothing to do with suspending the privilege of personal liberty guaranteed by the constitution.

Binney was perhaps successful in answering this objector; but there were others with whom it was harder to deal. Like Nicholas, they took the ground that if the clause were absent Congress would have the right to suspend; but they drew the authority to suspend, not from the power to regulate the courts, but from the power of Congress to suppress insurrection and repel invasion. One of them, George M. Wharton, took a wider range.² He quoted the clauses of the constitution

¹ Nicholas replied to this part of Binney's argument. He said, that whether it was obligatory on Congress to establish inferior courts was a doubtful question, and admitted to be such by Story. Congress, as was well known, had not yet given to the inferior courts the whole judicial power of the constitution. Congress once abolished the whole batch of inferior courts, and established new ones. In the interval between the repealing of the old and the establishing of the new could the old judges have exercised their powers on the ground that the repealing act was void? The duty of Congress to establish such courts was a moral, not a constitutional duty. *Habeas Corpus. A Response to Mr. Binney*, by S. S. Nicholas, Louisville, 1862; Story, Const., sec. 1593.

² Remarks on Mr. Binney's Treatise on the Writ of Habeas Corpus. By George M. Wharton, Philadelphia, 1862.

which gave Congress power to declare war, make rules concerning captures, raise and support armies, call out the militia, and make all laws which shall be necessary and proper for carrying these powers into execution, and said that the right to suspend could be implied from any one of them or from all of them together, and that the *habeas corpus* clause was simply a restriction on the power thus implied. Binney answered this by saying that it was too much at large, too indefinite. None of the powers contained any reference to the writ or even to the judicial department. He had already maintained that Congress could not impair the judicial department after it had once been created, and surely a right to impair an express provision of the constitution could not be implied from the war powers. Suspension of *habeas corpus* was a matter of municipal law, was not of the nature of military force, could not be identified with it, and could not be implied from it. If it could be implied from the power to call out the militia, or from any of the other war powers, it could be implied still more easily from the power to punish counterfeiting, for it would certainly be very useful against that offence.

But Wharton wrote another pamphlet¹ in which he fortified his argument admirably, and relied on the doctrine of the implied powers of Congress. This doctrine has been extended until it means that any act of Congress is constitutional which has such a relation to one or more of the expressed powers of Congress as in any way or under any circumstances to promote their efficiency. We hesitate to admit that the power to suspend *habeas corpus* may be implied from the right to make war, because it seems like such a great and substantial power that its authority ought to rest on something stronger than an implication. But in *McCullough vs. Maryland* the power of Congress to charter a bank was implied from the powers to collect taxes, borrow money, regulate commerce, declare war, and raise and support armies. Congress also has by implication the right to define and punish crimes; and the famous embargo

¹ Answer to Mr. Binney's Reply to "Remarks" on his Treatise on the Habeas Corpus. By George M. Wharton, Philadelphia, 1862.

act which by prohibiting vessels from leaving port practically destroyed commerce was said to be a natural incident of the power to regulate commerce. The whole question of *habeas corpus* hinges on this doctrine of implied powers. Congress may do all things necessary and proper to put down a rebellion, and if the suspension of *habeas corpus* is necessary and proper for that purpose, then Congress and not the President may suspend. Binney never answered these statements, and it is doubtful if they can be answered.

The argument against Binney amounts to this : If there were no *habeas corpus* clause the right to suspend could be implied from the war powers of Congress, therefore it is unnecessary to read a grant into a clause which is expressed in the form of a restriction, and so the clause is simply a restriction on the implied right of Congress to suspend. Then it is an undoubted fact that the state conventions when adopting the constitution supposed that the suspending power had been given to Congress alone. This of itself is almost enough to settle the question. What was intended by the convention which framed the constitution is of comparatively little importance. That convention was simply offering a constitution, and their opinion about it could not bind the people. But the state conventions were accepting, ratifying, and creating the constitution, and what they understood it to be is almost decisive. When we add to this the fact, that up to 1861 all authorities agreed in ascribing the power to Congress, we have an argument which even the marvellous ingenuity of Binney cannot overcome.

It is curious that in spite of the great importance of the *habeas corpus* question, very little is said about it in the debates of the convention which framed the constitution and it is hardly referred to in *The Federalist*. The people of that day were easily excited on the subject of liberty, and Binney suggests, that the Fathers said as little as possible about it, because they were afraid of arousing a discussion which would interfere with the adoption of the constitution. The addition of two or three words to the *habeas corpus* clause would have put the matter beyond the peradventure of a doubt, and their failure to do this

is hard to understand. Gouverneur Morris was the author of the clause as we now have it, and a chance passage in one of his letters has raised a suspicion that that adroit gentleman intended the *habeas corpus* clause to be exactly what it is, — a masterpiece of vagueness.¹

Besides Binney's argument there were three others which supported the President. One of them was by Attorney-General Bates.² He said, that in time of rebellion the President has a right to arrest and imprison such persons as he suspects of holding criminal intercourse with the enemy. He has this right because by his oath he has sworn to preserve, protect and defend the constitution; and Congress has confirmed him in this by those statutes which give him the use of the military power when the combinations are too powerful to be suppressed by judicial proceedings. It is his bounden duty, therefore, to put down insurrection, and Congress has given him the means and instruments which he may use at his discretion. If the insurgents assail with an army, he may find it best to use the army against them. If they employ spies and emissaries, he may find it necessary to arrest and imprison them. Having thus arrested and by this right, he is not bound to obey a *habeas corpus* issued to him by a court. The departments of government are independent of each other. Each has its own sphere. The President's duties are political; those of the courts are judicial. If in time of a rebellion the President arrests a man, it is a political act, not within the domain of the courts, and they cannot interfere with it. They cannot revise or reverse his political decisions. Can it be said, that after the President has conquered the insurgent army and arrested their emissaries, he is bound to

¹ "Having rejected redundant and equivocal terms I believe it to be as clear as our language would permit, *excepting, nevertheless, a part of what relates to the judiciary*. On that subject, conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases, which, expressing my own notions, would not alarm others, nor shock their self-love; and, to the best of my recollection, this was the only part which passed without cavil." Spark's Life and Correspondence of Gouverneur Morris, vol. iii, 322. See Third Part, The Privilege of the Writ of Habeas Corpus under the Constitution. By Horace Binney, page 21.

² 10 Opinions of Attorney-General, 74.

bring their bodies before any judge who may send him a writ of *habeas corpus*, and submit to whatever the judge shall see fit to order? Bates said he felt so sure of the power of the President, that he argued about *habeas corpus* only out of deference to the opinions of others; that he thought it no more necessary to suspend *habeas corpus* in order to enable the President to arrest spies¹ than to suspend the writ of replevin before seizing the arms and munitions of the enemy.

His reasoning is peculiar. He begins by assuming the proposition which has to be proved. He argues that the President has the power to suspend because he has the power to arrest and imprison. But the right to arrest is derived, if at all, from the right to suspend. It is impossible to reverse the order; for the privilege of *habeas corpus* is intended to be a protection against arrest and imprisonment by the sovereign. Again, he derives the right to arrest and imprison from the oath to preserve and defend the constitution. An oath cannot contain a grant of power which conflicts with other parts of the constitution, and the grant would in this case conflict with the provision declaring that no citizen shall be deprived of life, liberty or property without due process of law, and also with the provision which forbids arrests except by sworn warrants on probable cause. The only exception allowed by the constitution to these two provisions is when *habeas corpus* is suspended. Arrest and imprisonment derive their validity from suspension.² The right to arrest and imprison is the thing to be proved. His final assertion, that when the President has arrested an emissary it is a political act and cannot be interfered with by a department

¹ Bates uses the word spy all through his argument, but not I presume in its technical sense. There is no doubt that persons technically spies may be dealt with by the laws of war; they are outside of the pale of the civil law. Bates uses the word in a broad sense and means by it a citizen who remains at home and gives aid to the enemy. What to do with such persons was one of the great problems of the civil war.

² It was disputed during the war whether the President would have the right to arrest even when *habeas corpus* was suspended. Some said he would not, because it would violate the constitutional provisions about seizures and searches, due process of law and arrest warrants. They thought that when Congress suspended *habeas corpus* another act should be passed, giving the President the right to arrest. Suspend-

whose duties are judicial, is the most barefaced assumption that ever was heard of. What is *habeas corpus* for, what is all the talk about liberty for, if not to check these political acts of the ruler?

It remains to notice the two other views in support of the President's power. One declares that suspension of *habeas corpus* is an incident of martial law, the other that it is one of the implied rights of the commander-in-chief when engaged in putting down a rebellion. Martial law is best defined by distinguishing it from military law and military government. Military law is the code of rules and regulations for the government of the officers and enlisted men of the army, and applies to no others. Military government is the government by a military officer of a conquered foreign province where the local law has been overthrown. It applies to all the people in the province, but is supposed to last only until civil law can be re-established. Martial law is military government at home. It is the government by a soldier of the citizens of his own country. If an American general should invade Canada, conquer it, and govern its inhabitants, that would be military government.¹ If an American general in command of a district which included Ohio should undertake to govern the citizens of that state and to punish them for what he deemed to be crimes and offences, that would be martial law. Martial law is therefore the good pleasure of a soldier administered to the citizens of his district. It is the arbitrary will of one man; it overthrows all the civil law and of course suspends *habeas corpus*. Lincoln declared martial law in several parts of the country. If he had a right to declare it, *habeas corpus* was thereby suspended wherever such law extended.

sion gave him merely the right to detain, not the right to arrest. This seems to have been the opinion in Jefferson's time. Binney argued that if the President could, either by his own authority or by grant of Congress, suspend, he could at the same time arrest, because suspension must necessarily and by implication include the right to arrest. This is apparently the modern view, as supported by the practice of Congress and the decision in Milligan's case. *Ex parte* Milligan, 4 Wallace, 137.

¹ General Scott maintained military government in Mexico for a short time after the conquest.

When the war was over the Supreme Court decided, in Milligan's case,¹ after the most solemn argument and deep consideration, that the President could not declare martial law in any district not invaded by the enemy and where the judges were on the bench and the courts of law in operation. Martial law exists where there is a battle. It exists in a community where war exists and the courts and civil authorities are overthrown. A commander at the head of his army may impose it on states in rebellion, to cripple their resources and quell the insurrection. But it never exists where the courts and civil authorities are performing their normal functions. It prevails on the actual theatre of war because it is the only law there; the other law has been destroyed. Beyond these instances it cannot be created, except perhaps by an act of Congress.²

The decision in Milligan's case has played havoc with the theories that prevailed during the war. Lincoln maintained that any one who injured the efficiency of the military power could be seized by that power, tried by a military commission and, if necessary, hanged.³ It was quite generally believed among ardent Unionists, that martial law followed the army; that the right to carry on war being given to the government, all things necessary to make the war successful were implied.⁴ Undoubtedly when the Union armies captured a soldier of the Confederacy or an inhabitant of the Confederacy who was aiding the rebellion, such person was a prisoner of war, and could be held in confinement without a trial until the war was over, or he was exchanged. No one disputed that people who injured the government's military force in this way could be seized by the army wherever found. But suppose a man who had never been in

¹ *Ex parte* Milligan, 4 Wallace, 2.

² *Ex parte* Milligan, *supra*; *In re* Kemp, 16 Wisconsin, 359.

³ Greeley, *American Conflict*, vol. ii, 493.

⁴ William Whiting's pamphlets on War Powers, Military Arrests, *etc.* maintained these views. They passed through numerous editions and must have had a great influence. They have been called strong, but they are strong only in the sense of being dogmatic. They are now published in book form. Their author served during the war without pay as solicitor to the War department.

Confederate territory, who had never joined the Confederacy and who had no connection with it except by sympathy, should, in a loyal Northern state of which he was a citizen, persuade soldiers to desert, combine with others to liberate prisoners, to resist the draft, and to seize the arms and munitions in the arsenals, what name was to be given to this species of traitor? Beyond question he was injuring the military force of the government, and injuring it more thoroughly than if he were an armed Southern soldier. Could he be seized by the army and under martial law dealt with as the commander or a military tribunal saw fit? or must he be simply arrested and turned over to the courts and the ordinary procedure of law? This was Milligan's case. He was a citizen of Indiana, a state within the military district of General Hovey, but at that time not invaded by the enemy, or at most only threatened with invasion, and with courts of law and all the machinery of civil government in full operation. Milligan believed in the Southern cause, but he did not care to join the Southern army and carry a musket or wear a sword. He found he could do better at home; and he used his best energies to injure the National government and the Northern army, and belonged to a secret society devoted to that purpose. There is reason to believe that he and some others, belonging to the order of American Knights or Sons of Liberty, had formed a conspiracy to release the ten thousand Rebel prisoners in Indiana, supply them with arms from the Federal arsenal, and use them to conquer the state and take it over to the Confederacy. He and his accomplices were in communication with the enemy, and indulged freely in the usual disloyal practices of the party to which they belonged. It was a case which seemed to justify the argument, that whoever aids the enemy is an enemy, and may be dealt with by the army. A conspiracy by Northern men in the North certainly seemed to be as much an act of hostility as an open attack by armed Southern men from the South. It was hard to say to the army which Milligan attacked, that, because he was not a soldier and because he stood on loyal soil and by accident of birth and residence was a citizen of a loyal state, they could not touch him. It was equiva-

lent to saying that a citizen may take advantage of his citizenship and of the protection of his government to conspire against it. After they had caught this arch-traitor, tried him by a military commission and sentenced him to be hanged, they thought it a strange thing to be told that all their proceedings were void and that he must be allowed to go free. But that is what the Supreme Court decided and it is the law if the constitution is to be followed.

Milligan, though reeking with treason and rebellion, could not be taken as a prisoner of war. He was unfortunately a civilian and a resident of a state which was not the theatre of actual warfare, and in which the courts of law were wide open. All the offences of which he was accused were forbidden by law and could be punished by the courts.¹ *Habeas corpus* was at that time suspended by act of Congress. He might, therefore, have been arrested and held in custody to prevent his taking part in the conspiracy, and finally turned over to the courts for trial and punishment. But to seize him, try him, and condemn him by a military commission violated three or four provisions of the constitution. First of all, the constitution says, that "The trial of all crimes except in cases of impeachment, shall be by jury." Again, "No person shall be held to answer for a capital or otherwise infamous offence unless on presentment by a grand jury, . . . nor be deprived of life, liberty or property without due process of law." The sixth amendment declares that, "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed," and goes on to describe further formalities for such a trial. When used to deal with offences which can be tried in courts, martial law and military commissions violate every one of these provisions. The constitution says that no man may be tried and punished except by a jury and due process of law. If the courts are open, and opportunity given for jury trial and due process of law, the constitution must be obeyed, and it is absurd to say that martial

¹ 4 Wallace, 58, 122.

law may exist. When the courts are overthrown and there is no chance for jury and due process, then martial law exists by necessity. Necessity creates an exception to the rule of the constitution, and the constitution itself creates another exception by allowing the suspension of *habeas corpus*. But it is to be observed that the suspension of *habeas corpus* gives the power to arrest and hold, but not to try and punish.

There have been attempts made to weaken the authority of Milligan's case, but they are of little avail.¹ It is a decision which can stand severe criticism. It received all the light that advocates could give. Of the nine judges who composed the court at that time all but one were Northern men and five of the nine had been commissioned by Lincoln. They were on the side of the President and their political belief inclined them to support his views of martial law. Chase, the Chief Justice, went so far as to say, that, whether martial law was constitutional or not, it was at any rate sanctified by having had Lincoln's approval. Probably the whole court would have been content if the soldiers in Indiana had succeeded in disposing of Milligan; and if all the Milligans in the country had been dealt with in a similar way the grief of the learned court would not have been great. But they were Americans, and when called upon to be lawyers and judges they set aside their feelings and stood by the law and the constitution.

One of the best arguments in favor of martial law was made by Attorney-General Speed.² He was asked by President Johnson, at the close of the war, whether the accomplices of Booth in the assassination of Lincoln should be tried by the civil courts or by a military commission under martial law. He decided in favor of the military commission and based his opinion on the clause in the constitution which says that, "Congress shall have power to define and punish piracies, *etc.*, and offences against the law of nations." The law of nations, he said, is by

¹ See an ingenious argument by Bishop in his work on criminal law, vol. i, sec. 64, note; also Whiting's War Powers, page 460.

² 11 Opinions of Attorney-General, 297.

the constitution a part of the law of the land. As the laws of war constitute part of the law of nations they must also be part of the law of the land, and must exist whenever there is war and be binding on the citizens and the government. Congress may declare war, and when declared, it must be carried on according to its own peculiar laws. By the laws of war the army may capture the soldiers and sailors of the enemy, and, if accused of offences against the laws of war, try and punish them. The army may also capture guerillas, marauders, banditti, spies and other secret or open enemies, try and punish them according to the laws of war. Booth, he thought, was a secret enemy of the government, and his accomplices could accordingly be tried by a military commission. He avoided the constitutional provisions in regard to due process of law and jury trial by saying that the constitution gives the government power to carry on war, and therefore when war comes, the laws of war come with it and are exceptions to those provisions of the constitution. He also had to avoid the argument that the laws of war must, like the rest of the laws of the land, be subject to and modified by the constitution, and this he did by saying that the constitutional provisions for jury trial and due process refer only to crimes, whereas the clause of the constitution on which he relied, speaks of "offences against the law of nations." If an act were a technical crime according to statute or common law it was of course to be dealt with by the judiciary. But if an act were an offence against the law of nations it belonged to the jurisdiction of the army and its military tribunals. If this were not so, every soldier who killed an enemy in battle would be guilty of murder and would have violated the constitution, for he would have deprived a person of life without due process of law. So any one who holds a prisoner of war, is depriving him of liberty without due process of law. And if the army capture a spy and hang him, they are depriving him of life without due process of law, and also of the privilege of trial by jury. But all these acts are lawful because done under the laws of war. They belong to the jurisdiction of the laws of war and have nothing to do with jury trial and

due process. The constitution has established the laws of war and also the rule of jury trial and due process, and has assigned to each its own sphere and domain.

The answer to this reasoning brings us back again to the *Milligan* case. If a man commit an offence which is cognizable in a court, and the courts are open, he must be tried by a court and due process of law, for the simple reason that the constitution commands it. Undoubtedly the constitution provides for carrying on war, and war is to be waged according to the laws thereof. Undoubtedly there are acts, such as killing and capturing the enemy, which are lawful only under the laws of war, and undoubtedly there are offences which are purely offences against the laws of war and cannot be punished by the courts. The trial and punishment for spying, breaking parol, breaking a blockade, violating a flag of truce, uniting with guerrillas and bush-whackers, belong entirely to the military. But proving that the laws of war apply to these does not prove that the laws of war apply to offences for which a remedy is provided in the statute book. If the constitution says that no one shall be deprived of life, liberty, or property without due process of law, must not that provision be obeyed whenever it is possible to obey it? Although the constitution provides for war, the war cannot be carried on so as to violate other parts of the constitution. The constitution gives us power to deal with the enemy by the laws of war, but it does not give us power to administer the laws of war to our fellow-citizens. Every offence which can be tried in a court must be tried there, and an offence which cannot be tried in a court, and is purely military, may be left to the army. An offence which is both an offence against the laws of war and a crime triable in court should go to the court, for the command of the constitution is express in this respect and the right of trial by the laws of war is, at best, only implied. Neither the law of nations nor the laws of war can be allowed to overcome, within our own territory, the express words of the constitution. The constitution is the supreme law of the land, and no outside influence or outside law can be paramount to it. The laws of war as laid down by Vattel and

other European writers may, perhaps, be liberally construed and administered in monarchical countries, but in a country with a written constitution giving only limited powers to the government, they must yield to the constitution and suffer change whenever they contradict it.

Booth murdered Lincoln, declaring that it was for the good of his country, and he was hunted down and shot as he deserved; but his accomplices were tried by a military commission. Guiteau murdered Garfield, saying that it was for the good of his country, and he was tried by the ordinary process of the law. There is no difference between the two cases. They are both crimes triable only in court.

A discussion of martial law is never complete until General Jackson's declaration of it at New Orleans is mentioned. After he had fought and won the battle of New Orleans and knew, though not officially, of the ratification of the treaty of peace, he undertook to govern the city by martial law. The excuse he gave was that the enemy, though beaten, were still in the neighborhood and might return, that the knowledge of peace had demoralized the militia under his command, and brought the whole city into a state of turbulence. Jackson always believed that the salvation of the country depended on his being absolute master of every one about him, and this trait had probably as much to do with the declaration of martial law as any difficulty or danger in his situation. A certain Louallier thought his conduct illegal, and was bold enough to say so in print. He was immediately arrested. Judge Hall of the United States district court issued a *habeas corpus* for his release, and Jackson, being determined to strike at the root of the matter, arrested the judge. Afterwards, when the judge got back into his court, he called Jackson before him and fined him a thousand dollars for contempt. Jackson promptly paid the fine, and after many years it was refunded to him by act of Congress. In passing the act some of Jackson's friends justified him on the ground of necessity which, they maintained, always decided the right or wrong of martial law. Others did not seem to care whether his act was legal or not; he was a grand old

hero, they said, and had conquered the British. Some admire Jackson because in spite of law and at the risk of his reputation he acted for the safety of his country. Others admire Judge Hall, because he upheld the dignity of the law against the despotism of a soldier. The precedent has become a most valuable one, for it can be cited on both sides. It is like the other instances of martial law in America. In the Revolution, Gage, the British general at Boston, declared martial law five days before the battle of Bunker Hill, and even his own countrymen thought it outrageous. An attempt was also made to declare it in Virginia during the Revolution, and nearly everybody thought it was outrageous.¹ The Declaration of Independence says that it was outrageous for the king to make the military superior to the civil power; and many of the state constitutions have said that the military shall never be superior to the civil power. Everything is against martial law, and yet whenever a president, king, or general is driven to extremities he will make use of it, and those who complain will complain in vain. He who declares martial law has already an army with which to enforce his decrees. After the emergency is past, if he has been successful and has not been cruel or reckless in its use, he will, in all probability, be forgiven; and the American people are among those most likely to forgive.²

And now suppose it to be proven that the President cannot lawfully suspend *habeas corpus* without authority from Congress, what have we gained? Very little. The fact remains, that for two years Lincoln suspended the writ, and arrested the enemies of the government as freely as if the right had been expressly given him.³ People who objected were allowed the privilege of

¹ Washington fought the seven years of the Revolution to a successful end, and never made use of martial law at all.

² The other theory giving the President power to suspend *habeas corpus* was advocated by Reverdy Johnson of Baltimore. He maintained that the President could suspend in time of war as an incident of his office of commander-in-chief of the army and navy. The power to wage war implied, he said, the power to suspend the ordinary securities of liberty and property. But it is easy to see that this argument of Johnson's is nothing but martial law in a new form. It is simply a trick to get rid of the odious name of martial law by calling it commander-in-chief.

³ The fact also remains that our liberties are unimpaired. The Union is restored, and life, liberty and property are as safe to-day as they were before the war.

complaining. Some wrote learned pamphlets against him, some passed resolutions, and judges filed indignant opinions. They might have spared themselves the trouble. Lincoln never ceased to use his great power, but he used it without tyranny or cruelty. The great mass of the loyal people either thought he was right or forgave him his wrong. Most of them sympathized with his pathetic exclamation, "Are all the laws but one to go unexecuted and the government itself to go to pieces lest that one be violated?" The man who saved the Union in the war of the Rebellion, and the man who shall hereafter save it in some other war, will never be held to a very strict account for violations of the constitution. Events are stronger than the constitution and stronger than constitutional law. What the people permit to be done in violation of the constitution may by continual repetition become part of the constitution. The acquisition by treaty of the Louisiana territory was admitted by its advocates to be unconstitutional; but the people consented to it, and also to subsequent acquisitions, and no one now thinks it worth while to argue against them. May it be said that the consent of the people has given the President power to suspend *habeas corpus*?

The English nation has had great experience with the *habeas corpus* question, and it is good proof of the wisdom of their law that Lincoln's method was in almost exact accordance with it. Since the time of William III. it has been the custom in England for the ministry, when the emergency arises, to arrest and hold in defiance of the writ, and afterwards ask Parliament for an Act of Indemnity. The reason is obvious. If they waited to get a bill through Parliament the conspiracy or rebellion might become successful, or, as was the case with ours, gain such headway as to be difficult to subdue. Parliament moreover might not be in session. It was the prompt action of the ministers of the crown that saved the life of William III., and Parliament not only indemnified them, but thanked them for it. Lincoln found himself face to face with a rebellion, and Congress not in session. He called out the militia, increased the army and the navy, and suspended *habeas corpus*. After-

wards in his message to Congress he submitted all his acts to their judgment. They supported him as far as they could. A bill was passed August 16, 1861, making valid all his acts in regard to the army, navy and militia, and giving them the same effect as if they had been done under the previous authority of Congress.¹ About the same time a joint resolution was introduced in the Senate making valid his suspension of *habeas corpus*, but though much debated it never reached a vote.² Afterwards in December, 1862, the House of Representatives passed a bill indemnifying the President for previous suspensions of *habeas corpus* and giving him authority to suspend in the future.³ The Senate would not agree to the clause making valid the previous suspension, and the bill finally passed both houses with that clause omitted and became known as the *Habeas Corpus* Suspension act of March 3, 1863. Both President and Congress, driven by the necessities of a state of rebellion, followed the English practice as closely as circumstances would allow. But there was this difference. If the President had violated the constitution, Congress could not make his acts valid. There is no power in Congress to excuse violations of the constitution. Even the elastic war powers cannot be stretched to that extent.

It might be well therefore if Binney's argument were the true one. It is the only one that, under the present wording of the constitution, can by any possibility give the power to the executive. It gave him during the Rebellion at least a claim of right, and was adopted and repeated in the speeches of all the Republican leaders. The *habeas corpus* clause as now understood stands in the way of the government's protecting itself. In such a case we want something more than a claim of right. Violations of the constitution demoralize the people and abate their reverence for the great charter; but violations will surely come if such provisions are to remain. Every man thinks he

¹ 12 U. S. Statutes at Large, 326.

² Introduced July 6, 1861, and debated at various times until August 6, of the same year, when the Senate adjourned.

³ Introduced December 8, 1862.

has a right to live and every government thinks it has a right to live. Every man when driven to the wall by a murderous assailant will override all laws to protect himself, and this is called the great right of self-defence. So every government, when driven to the wall by a rebellion, will trample down a constitution before it will allow itself to be destroyed. This may not be constitutional law, but it is fact.

SYDNEY G. FISHER.

LIST OF PAMPHLETS, ETC., ON THE HABEAS CORPUS QUESTION, PUBLISHED DURING THE WAR.

1. Decision of Chief Justice Taney in the Merryman case, upon the Writ of Habeas Corpus, published by authority, Philadelphia, John Campbell, Bookseller, 419 Chestnut St., 1862. (Same reported in Taney, 246.)

2. Habeas Corpus. The proceedings in the case of John Merryman of Baltimore County, Maryland, before the Hon. Roger Brooke Taney, Chief Justice of the Supreme Court of the United States, Baltimore. Published by Lucas Brothers, 170 Baltimore St., 1861.

3. Suspension of the Writ of Habeas Corpus. Letter from Attorney General transmitting his opinion. Printed by order of House of Representatives.

4. The Privilege or the Writ of Habeas Corpus under the Constitution. Second Edition, Philadelphia; C. Sherman & Son, Printers, 1862. By Horace Binney.

5. Second Part. The Privilege of the Writ of Habeas Corpus under the Constitution. Philadelphia, John Campbell, Publisher, 419 Chestnut St., 1862. By Horace Binney.

6. Third Part. The privilege of the Writ of Habeas Corpus under the Constitution, Philadelphia. Sherman & Co., Printers, 1865. By Horace Binney.

7. A review of the Argument of President Lincoln and Attorney General Bates in favor of the Presidential Power to suspend the Privilege of the Writ of Habeas Corpus. By S. S. Nicholas of Louisville, Ky. Printed by Bradley & Gilbert, Cor. First and Market Sts., 1861.

8. Habeas Corpus. A Response to Mr. Binney, by S. S. Nicholas, Louisville. Printed by Bradley & Gilbert, 1862.

9. Martial Law. By S. S. Nicholas, part of a pamphlet first published in 1842 over the signature of A Kentuckian. Philadelphia, John Campbell, Bookseller, 419 Chestnut St., 1862.

10. A Review of Mr. Binney's Pamphlet on "The Privilege of the Writ of Habeas Corpus under the Constitution." By J. C. Bullitt, Philadelphia, John Campbell, Publisher, 419 Chestnut St., 1862.

11. Remarks on Mr. Binney's Treatise on the Writ of Habeas Corpus.

By G. M. Wharton. Second Edition, Philadelphia, John Campbell, Bookseller, 419 Chestnut St., 1862.

12. Answer to Mr. Binney's Reply to "Remarks" on his treatise on the Habeas Corpus. By Geo. M. Wharton, Philadelphia, John Campbell, Bookseller, 419 Chestnut St., 1862.

13. Authorities cited Antagonistic to Horace Binney's Conclusions on the Writ of Habeas Corpus. By Tatlow Jackson: John Campbell, Bookseller, 419 Chestnut St., Philadelphia, 1862.

14. An Undelivered Speech on Executive Arrests. Philadelphia, 1862. By Charles Ingersoll.

15. Personal Liberty and Martial Law. A Review of some Pamphlets of the day. Philadelphia, April, 1862. By Edward Ingersoll.

16. The Writ of Habeas Corpus and Mr. Binney. Second Edition: Philadelphia. John Campbell, Bookseller, 419 Chestnut St., 1862. By John T. Montgomery.

17. Reply to Horace Binney on the Privilege of the Writ of Habeas Corpus under the Constitution. By a member of the Philadelphia Bar. Philadelphia, James Challen & Son, Publishers, 1308 Chestnut St., 1862. (Author, David Boyer Brown.)

18. A reply to Horace Binney's Pamphlet on the Habeas Corpus. Philadelphia, 1862. Anonymous. (Author, C. T. Gross(?).)

19. The Privilege of the Writ of Habeas Corpus under the Constitution of the United States: In what it consists. How it is allowed: How it is suspended: It is the Regulation of the Law, not the Authorization of an exercise of Legislative Power. John Campbell, Bookseller, 419 Chestnut St., Philadelphia, 1862. Anonymous. (Author, Wm. M. Kennedy(?).)

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S. G. F.